IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1921.

16

No. [redacted], Original.

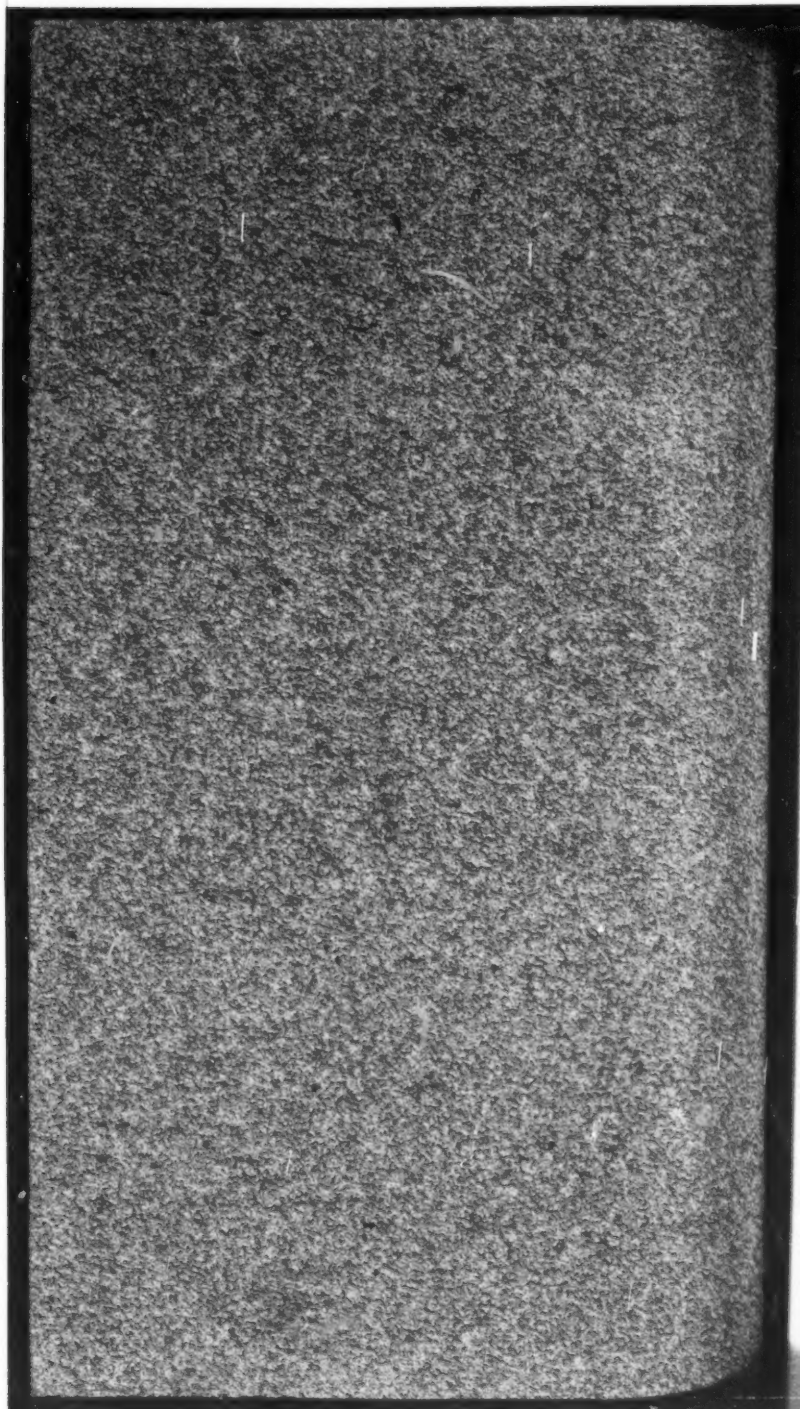
THE STATE OF GEORGIA

vs.

THE STATE OF SOUTH CAROLINA.

BRIEF FOR THE DEFENDANT.

S. M. WOLFE,
Attorney General
A. M. LUMPKIN,
Acting Assistant Attorney General, of Counsel,
Attorneys for the State of South Carolina, Defendant.



IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

No. 22, Original.

THE STATE OF GEORGIA

vs.

THE STATE OF SOUTH CAROLINA.

BRIEF FOR THE DEFENDANT.

This is an action instituted in the original jurisdiction of the Court on the part of the State of Georgia against the State of South Carolina pursuant to a resolution adopted August 21, 1917, by the General Assembly of the State of Georgia, whereby the Attorney General of the State of Georgia was authorized and requested to institute a suit or suits in the Supreme Court of the United States by and in the name of the State of Georgia against the State of South Carolina "for establishing the claim and boundary of Georgia to and including the entire bed of said Savannah and Tugaloo rivers in their entire lengths, islands and all, clear over to the South Carolina shore, at the ordinary mean-water level

In

of said rivers, and to prosecute for and recover the same wherever any diverse occupancy does or may exist."

The original bill in chancery was served upon the defendant through the Governor and the Attorney General, respectively, of the State of South Carolina, on April 9, 1919, and within due time thereafter an answer to said bill in chancery was filed with the clerk of this Court, and copies thereof served upon the Governor and the Attorney General, respectively, of the State of Georgia.

The complaint alleges, in substance, without reference to pact or treaty, that the State of Georgia is entitled to have the Court decree that the eastern boundary of the State of Georgia is the "*Northern or eastern bank of the rivers Chattooga, Tugaloo and the Savannah, at the ordinary mean-water level on their eastern banks,* and for such other and further relief as the necessity of the case and the principles of equity demand. The answer of the defendant, the State of South Carolina, contends, in substance, that the true boundary line between the States is that fixed by the pact, pursuant and agreeably to the 9th article of the confederation, entered into by and between authorized commissioners from the respective States in the convention concluded at Beaufort, South Carolina, on the 28th day of April, in the year 1787, which said pact or treaty was thereafter duly ratified by the legislative bodies of the two respective States and by the Congress assembled of the United States, and that by virtue of said pact or treaty the true line dividing the two States should be decreed by the Court to be the low-water mark at the southern shore of the most northern stream of the rivers Savannah and Tugaloo, respectively, where said rivers are broken by

islands, and the middle thread of the stream of said rivers where they flow in one stream or volume, and the middle thread of the stream, or the southern shore, of the River Chattooga, saving to herself at all times herein all manner of benefits of exception or otherwise that can or may be had.

On June 7, 1920, in response to a motion directed to this purpose, the Court appointed Chas. S. Douglas, Esq., of Washington, D. C., as special master to take and report the testimony and exhibits without conclusions of law or findings of fact, and that in pursuance thereto the testimony was taken and reported to the Court, and said testimony, with the exhibits therein, constituting the report of the special master by agreement of counsel, is the *record* upon which the Court is to determine the issues involved. By virtue of the stipulation, however, at page 22, folios 40 and 41, inclusive, this record is to be supplemented in the hearing and consideration of this case by reference to the *originals or certified copies of the originals*, of such documents as are stated and noted in evidence but not set out in detail.

Attention of the Court is, in the outset, directed to the stipulation embraced in the record at pages 18 to 23, inclusive, wherein the salient facts upon which the case must rest are concisely and more logically recited.

It will be observed that the territory comprising the State of Georgia was formed from a portion of the territory originally comprising a part of the province of South Carolina. In the case of *Handly's Lessee v. Anthony et al.*, 5 Wheat., 374-382; 5 L. Ed., 113, the Court said:

> "When a river is the boundary between two nations or States, if the original territory is in neither, and

there be no convention respecting it, each holds to the middle of the stream, but when, as in this case, one State is the original proprietor and grants the territory on one side only, it retains the river within its own domain, and the newly created State extends to the river only, and the low-water mark is its boundary."

In the stipulation to which the attention of the Court has been directed, pages 18 to 23, inclusive, of the record, and especially folios 38 and 39, inclusive, it is conceded by the parties to this suit that the Treaty of Beaufort, and the lines fixed therein, in so far as they are defined, are binding. Irrespective of such stipulation, the defendant respectfully submits that the boundary established and fixed by compact between nations becomes conclusive upon all the subjects and citizens thereof, and binds their rights, and is to be treated to all intents and purposes as the true, real boundary, and the construction of such compact is a question for judicial determination.

Rhode Island v. Mass., vol. 12, Sup. Ct. Rep., January term, 1838, page 657.

The Beaufort convention was the result of a petition by the State of South Carolina to the United States Congress under the 9th Article of the Articles of Confederation of 1777. It appears that the formalities and prerequisites incident thereto were complied with. Moreover, the boundary in so far as it is definite and established by the Beaufort Treaty, has been recognized and acquiesced in by the two States since the date of its adoption, and the provisions of

the compact would in no event be disturbed by a court of chancery at this time.

Maryland v. West Va., 217 U. S., 1; 54 L. Ed., 645.
Louisiana v. Miss., 202 U. S., 1; 50 L. Ed., 913.
Virginia v. Tenn., 148 U. S., 503; 37 L. Ed., 637.
Indiana v. Kentucky, 136 U. S., 479; 34 L. Ed., 329.
Rhode Island v. Mass., 4 How., 591; 11 L. Ed., 1116.
Rhode Island v. Mass., 15 Pet., 233; 10 L. Ed., 721.

Hence the whole question for determination in this suit is a construction of that treaty in respect to its indefiniteness and in respect to the contentions of the respective parties-litigant herein, and to determine how far the Treaty of Beaufort has altered the common law in respect to the beds and the navigable rights in the rivers forming the boundary line between them.

By a reference to the map set out as an exhibit in the record at page 94, which is a map of the Beaufort District of South Carolina, surveyed by C. Vignoles and adopted for Mills' Atlas of 1825, as well as from a reference to the U. S. Coast and Geodetic Survey (U. S.—East Coast. Tybee Roads—Savannah River and Wassaw Sound, Georgia), it will be seen that at the mouth of the Savannah River there is what is termed "Cockspur Island," and there are Long Island, Elba Island, and a series of other islands up the river above this island which for some distance divides the Savannah River into two streams. The grant of the Lords Proprietors constituted the province of "Carolina," which embraced the present States of North Carolina, South Carolina, Georgia, Alabama, Mississippi, and Tennessee. Carolina was first divided into two provinces, to wit, North Carolina and South

Carolina, and subsequently, in 1732, Georgia was carved out of South Carolina territory by royal grant wherein it was described as: "all those lands, countries and territories situate, lying and being in that part of *South Carolina* in America which lie from the most northern Stream of a River there commonly called the Savannah all along the seacoast to the southward unto the most southern stream of a certain other great Water or River called the Alatamaha." (See Record, page 20, folios 34-35, inclusive.) Again, at page 19 of record, folio 34, it will be seen, upon petition having been made for the establishing of a province in the American continent for the poor of Europe, that the petition was referred to the Board of Trade of Great Britain, which Board of Trade recommended that His Majesty would be pleased to incorporate the petitioners in a charitable society, and further recommended that His Majesty be pleased to grant said petitioners and their successors forever "all that tract of land in his province of South Carolina lying between the rivers Savannah and Alatamaha, to be bounded by the most navigable and largest *branches* of the Savannah, and the most southerly branch of the Alatamaha." The Beaufort convention stipulated (see Record, page 25, folios 45-49, inclusive), in Article I, as the boundary: "the most northern branch or stream of the River Savannah, from the sea or mouth of such stream to the fork or confluence of the rivers now called Tugaloo and Keowee; and from thence, the most northern branch or stream of the said River Tugaloo, till it intersects the northern boundary line of South Carolina, if the said branch or stream of Tugaloo extends so far north, *reserving all the islands in the said rivers Savannah and Tugaloo to Georgia,*" etc. *Article II* prescribes that the

navigation of the River Savannah at and from the bar and mouth, along the northeast side of Cockspur Island, and up the direct course of the main northern channel along the north side of Hutchinson's Island, opposite the town of Savannah, to the upper end of said island, and from thence up the bed or principal stream of the said river to the confluence of the rivers Tugaloo and Keowee, etc., shall be equally free to the citizens of both States, etc. This second article of the so-called pact or treaty under the decision of the State of South Carolina *v.* Georgia, reported in 3 Otto., 4-14, inclusive; 93 U. S., 23; L. Ed., 282, would be of no value other than possibly to throw some light upon the *intent* of the States as expressed in this treaty, for in the case of South Carolina *v.* Georgia (*supra*) the State of South Carolina stands in no better position, so far as her navigation rights are concerned, than she would if the pact of 1787 between herself and Georgia had never been made; that the pact defined the boundary between the two States, and also defined the navigable rights of the two States, which the decision holds would be precisely the same as that which the two respective States would have possessed under the common law, inasmuch as the original charter of the Province of Georgia, fixed the Savannah River as the boundary between that province and South Carolina. Quoting the decision, the Court said:

> "It needed no compact to give to citizens of adjoining States a right to the free and unobstructed navigation, of a navigable river which was the boundary between them. Moreover, after the treaty between the two States was made, both parties to it became members of the United States. Both adopted the Fed-

> eral Constitution, and thereby joined in delegating to the General Government the right to 'regulate commerce with foreign nations and among the several States.' Whatever, therefore, may have been their rights in the navigation of the Savannah River before they entered the Union, either as between themselves or against others, they both agreed that Congress might thereafter do everything which is within the power thus delegated * * *. Prior to the adoption of the Federal Constitution the States of South Carolina and Georgia together had complete dominion over the navigation of the Savannah River. By agreement they might have regulated it as they pleased. It was in their power to prescribe, not merely on what conditions commerce might be conducted upon the stream, but also how the river might be navigated, and whether it might be navigated at all. They could have determined that all vessels passing up and down the stream should pursue a defined course, and that they should pass along one channel rather than another where there were two. They had plenary authority to make improvements in the bed of the river, to divert the water from one channel to another, and to plant obstructions therein at their will."

In this decision, it may not be amiss to suggest that the Court recognizes as a matter of fact that opposite the city of Savannah the river is divided "by Hutchinson's Island, and that there is a natural channel on each side of the island."

In the light of the foregoing, it will be observed that, in so far as the navigable feature of the case is concerned, the Treaty of Beaufort made no changes in the rights of navigation other than those obtaining under the common law.

In paragraph 7 of the original bill of complaint herein, purporting to quote from the original letters patent from the King, it is alleged that Georgia, in being taken out of the State of South Carolina, was described as "lying from the most northern part of a stream or river called the Savannah." This term, "northern part," occurs repeatedly throughout the bill of complaint, and, as stated in the preamble of this argument, seems to have resulted from a misprint which had been, through oversight or other inadvertence, perpetuated up until the present in the official documents of the State of Georgia pertaining to the boundary line between the two States. The true wording of all the documents pertaining to this boundary is not as alleged in the complaint, but, on the other hand, it is consistently "the most northern stream of the river called the Savannah from the sea or mouth of said stream." Hence it is contended that what was referred to by the framers of the Beaufort Treaty was that the boundary should extend from low-water mark on the southern shore of the Cockspur Island, or Hutchinson's Island, at or near the mouth of the Savannah River, which islands divide the Savannah River into two streams, forming a northern stream and a southern stream, respectively, along the coast to the most southern stream of the River Alatamaha. It was intended to preserve the status of the proprietorship of the islands within this stream, and to reserve them to the State of Georgia, creating where the Savannah and Tugaloo rivers were broken by islands such boundary line as would accomplish this end. Inasmuch as it was fully within the power of the two States to change the law of navigation by treaty or otherwise, the second article of the treaty would have been purely superfluous had it not occurred to

the framers of the treaty that the article in its correct interpretation would further safeguard to the State of Georgia merely the property rights in the islands which, under the common law and in the absence of a treaty, would have been South Carolina territory. If, as held in the decision of the State of S. C. *v.* Georgia, 23 L. Ed., 782, the rights of navigation on these rivers were not changed by the Treaty of Beaufort, it follows that the law pertaining to the boundaries between States, where those boundaries consist of navigable rivers, is the same as that obtaining under the common law. In this event, the rivers, *where unbroken by islands,* would in themselves constitute the boundary between the two States and would be equally free to the respective States for *navigation purposes, and the entire bed of the rivers would, by virtue of the province of Georgia having been carved out of the province of South Carolina, belong to the State of South Carolina, and the boundary line formed by these rivers, where unbroken by islands, would be low-water mark on the Georgia, or southern bank of these rivers, Savannah, Tugaloo, and Chattooga.*

A careful reading and analysis of the Treaty of Beaufort, and especially Article I of the treaty, will show conclusively that the terms "branch" and "stream" are used synonymously and interchangeably throughout the document, and in no event could be construed to imply that the contention of the plaintiff herein, to wit, that the Eastern boundary of the State of Georgia is the northern or eastern *bank* of the rivers Chattooga, Tugaloo and Savannah, is correct. If this contention could be sustained, the stipulation in Article I of the treaty "reserving all the islands in said rivers Savannah and Tugaloo to Georgia" would mean absolutely nothing.

The inevitable significance to be attached to this stipulation is that which has already been suggested in connection with the provisions as to navigation stipulated in Article II of the treaty, to wit, that the representatives of the State of Georgia in the Beaufort convention clearly conceded the common-law rights of South Carolina in the premises and acknowledged her title and property rights in the beds of the rivers. Hence it is respectfully submitted that under the practice in courts of chancery, irrespective of the petition or prayer in the complaint and answer, the Court is entitled to do equity and adjudicate the issues involved so as to mete out to the litigants their full rights under the law; and if the facts and the law so warrant, the boundary line should be so declared as to give to the State of South Carolina possession of the entire bed of the three rivers except where the rivers Tugaloo and Savannah are broken by islands, and where this is the case the boundary line should be low-water mark of the southern shore of these islands, and that for navigable purposes, and in so far as the streams themselves are concerned, the boundary line should be according to the doctrine of the Thalweg, enunciated in the case of *Ark. v. Tenn.*, reported in 246 U. S.; 62 L. Ed., 638, the middle of the main navigable channel in these rivers.

For the information of the Court and pertinent to the various questions involved, the following decisions with their syllabi are cited:

Constitutional Law.

South Carolina Constitution of 1895.

Art. 1, *Section* 28.—"All navigable waters s
forever remain public highways free to the citi
of the State and the United States without ta
impost or toll imposed; and no tax, poll, impos
wharfage shall be imposed, demanded or recei
from the owners of any merchandise or commo
for the use of the shores or any wharf erected on
shores or in or over the waters of any navig
stream unless the same be authorized by the Gen
Assembly."

Art. 14, *Section* 1.—"The State shall have
current jurisdiction on all rivers bordering on
State, so far as such rivers shall form a comm
boundary to this and any other State bounded
the same; and they, together with all navig
waters within the limits of the State, shall be c
mon highways and forever free, as well to the
habitants of this State as to the citizens of the Un
States, without any tax or impost therefor, un
the same be expressly provided for by the Gen
Assembly."

(See **McMeekin** *v.* Central, etc., Power Co.
S. C., 512; 61 S. E., 1020; 128 Am.
Rep., 885.)

The Constitution of the State of Georgia as amended
incorporated in Prince's Digest Laws of Georgia to 1
Section 23, declaration of the boundaries of the State, to

"That is to say, the limits, boundaries, juris
tions, and authority of the State of Georgia do

did and of right ought to extend from the sea, or the mouth of the River Savannah, along the northern branch or stream thereof to the fork or confluence of the rivers now called Tugaloo and Keowee, and from thence along the most northern branch or stream of the said River Tugaloo till it intersects the northern boundary line of South Carolina, if the said branch or stream of Tugaloo extends so far north, reserving all the islands in the said rivers Savannah and Tugaloo to Georgia; but if the head spring or source of any branch or stream of the said River Tugaloo does not extend to the north boundary line of South Carolina, then the West line to the Mississippi," etc.

Statutory Law.

See convention of Beaufort incorporated in Hotchkiss' Statute Law of Georgia and State Papers (Appendix), pages 913 to 917, inclusive.

Chapter I, Article 1, Code of Georgia, 1867, paragraphs 15 to 19, inclusive. Section 16 is as follows:

> "The boundary between Georgia and South Carolina shall be the line described as running from the mouth of the River Savannah, up said river and the Rivers Tugaloo and Chattooga, to the point where the last-named river intersects with the thirty-fifth parallel of north latitude, conforming, as much as possible, to the line agreed on by the commissioners of said States at Beaufort on the 28th April, 1787."

J. L. Petigru's Code of South Carolina, 1860, Part First, "Territory of the State," in which the boundary line between Georgia and South Carolina is described as follows:

"From the State of Georgia South Carolina is divided by the Savannah River, from its entrance into the ocean to the confluence of the Tugaloo and Keowee rivers; thence by the Tugaloo River to the confluence of the Tugaloo and Chattooga rivers; thence by the Chattooga River to the North Carolina line aforesaid, in the thirty-fifth degree of north latitude, the line being low-water mark at the southern shore of the most northern stream of said rivers, where the middle of the rivers is broken by islands, and the middle thread of the stream where the rivers flow in one stream or volume."

See Charter of Georgia and Gov. Reynolds' commission, in the same terms. Watkins' Digest, 737. (Convention of Beaufort, 1787.)

Shultz v. Bank, U. S. Circuit Court, 1822.

Bank v. Harper, Columbia, Dec., 1833.

Handly v. Anthony, 5 Wheat., 374.

See Part 1, Chap. 1, Sec. 1, Code of Laws of S. C., 1902, vol. 1.

See also Part 1, Chap. 1, Sec. 1, vol. 1, Code of Laws of South Carolina, 1912, which describes the boundary between Georgia and South Carolina as follows:

"From the State of Georgia, South Carolina is divided by the Savannah River from its entrance into the ocean to the confluence of the Tugaloo and Seneca Rivers; thence by the Tugaloo River to the confluence of the Tugaloo and Chattooga rivers; thence by the Chattooga River to the North Carolina line aforesaid, in the thirty-fifth degree of north latitude, the line being low-water mark at the southern

shore of the most northern stream of said rivers where the middle of the rivers is broken by islands, and the middle thread of the stream where the rivers flow in one stream or volume.

Charters and Treaties.

The first charter granted by King Charles Second to the Lords Proprietors of Carolina, pages 22 to 31, inclusive, Statute of S. C., vol. 1.

Second charter of Carolina, 1665, *id.*, pages 31 to 40, inclusive.

See the Act for establishing the agreement with seven (7) of the Lords Proprietors of Carolina for the surrender of their title and interest of that province to His Majesty, (1729), *id.*, pages 60 to 71, inclusive.

See the ordinance to nullify an Act of Congress of the United States to provide for the collection of duties on imports, commonly called the Force Bill, pages 400-401, inclusive, *id.*

See extract from Gov. Drayton's view of South Carolina, 1802, *id.*, pages 404 to 410, inclusive.

See the ordinance ratifying and confirming the convention between the States of South Carolina and Georgia concluded at Beaufort, in the State of South Carolina, on the 28th day of April, 1787, and in the 11th year of the Independence of the United States of America, pages 411 to 414, inclusive, *id.*

The defendant alleges in paragraph 26 of its answer that the construction of the Beaufort Treaty, to wit, that the thread of the stream where there are no islands is the boundary line, and that the northern shore of the island in the rivers Tugaloo and Savannah, respectively, where these rivers

are broken by islands is the boundary line is *res adjudicata*, and, therefore, under the rules of practice it is necessary that the defendant introduce in evidence such authorities as sustain this contention. These authorities are as follows:

(1) The decision *In re* Shultz & Breithaupt *et al. v.* the State Bank of Ga. *et al.* (1822 MSS. Decision per Johnson, justice presiding, U. S. Circuit Court), a certified copy of which is offered in evidence. This decision was confirmed in the case of Jos. J. Kenedy, trustee of Henry Shultz *v.* The Bank of the State of Ga., reported in 8 How., page 586; 12 L. Ed., 1209.

(2) Fletcher *v.* Peck, 6 Cranch., U. S., Sup. Ct. Rep., page 86; 3 L. Ed., 162.

(3) S. C. *v.* Georgia *et al.*, 3 Otto., U. S. Sup. Ct. Rep., 4. This decision does not discuss nor attempt to pass upon any matters pertaining to the boundary lines, but merely upon those matters pertaining to navigation of the three rivers forming the boundary line between the States and inferentially leaves the boundary line as suggested and as fixed by the treaty intact.

(4) Georgia Railway & Power Co. *v.* Wright, Comptroller General, *et al.*, 146 Ga. St. Rep., 29, and cases therein cited, in which the contentions of the defendant as to the construction of the Beaufort Treaty are sustained.

See *Simpson v. State*, 92 Ga., 41; 17 S. E., 984; 22 L. R. A., 248; 44 Am. St. Rep., 75.

Also *James v. State*, 10 Ga. App., 13; 72 S. E., 600.

Acquiescence.

Arkansas v. Tenn., 246 U. S., 158; 62 L. Ed., 638.
Maryland v. W. Va., 217 U. S., 1; 54 L. Ed., 645.
Louisianna v. Miss., 202 U. S., 1; 50 L. Ed., 913.
Virginia v. Tenn., 148 U. S., 503; 37 L. Ed., 537.
Indiana v. Kentucky, 136 U. S., 479; 34 L. Ed., 329.
Rhode Island v. Mass., 4 How., 591; 11 L. Ed., 1116.
Rhode Island v. Mass., 15 Pet., 233; 10 L. Ed., 721.
Missouri v. Iowa, vol. 7, U. S. Sup. Ct. Rep., Jan. term, 1849, page 660.

The Doctrine of the "Thalweg."

The rule adopted, known as the rule of the "Thalweg," is that where navigable streams form the boundary line between two States the controlling consideration is that which preserves to each State *equality in the navigation* of the river, and that in such instance the boundary line is the middle of the *main navigable* channel of the river.

See

Ark v. Miss., supra.
Ark. v. Tenn., 246 U. S., 158; 62 L. Ed., 683; 38 Sup. Ct. Rep., 301.

See also the following decisions:

Louisiana v. Miss., 202 U. S., 1, 49; 50 L. Ed., 913, 930; 26 Sup. Ct. Rep., 408, 571.
Washington v. Oregon, 211 U. S., 127, 134; 53 L. Ed., 118, 119; 29 Sup. Ct. Rep., 47; 214 U. S., 205, 215; 53 L. Ed., 969, 970; 29 Sup. Ct. Rep., 631.

The boundary line between two States, where in dispute, must be determined upon a consideration of the situation existing at the time of the enacting of the statute or adoption of the treaty purporting to establish the boundary line.

Minnesota v. Wis., U. S. Sup. Ct. Adv. Op., 1919-1920, No. 11, page 345.

In the case of *Maryland v. West Virginia, supra*, it was held:

> "1. The boundary-line between the States of Maryland and West Virginia from the head waters of the Potomac to the Pennsylvania line is adjudged to be the 'Deakins' or 'old State' line, run in or about the year 1788, which ever since has been recognized as the boundary and has served as such, although steps have been taken from time to time looking towards a more effectual legal settlement and delimitation of the boundary, none of which have been effectual or such as to disturb the continuous possession of the people claiming rights up to the boundary line."
>
> "2. The State of West Virginia is not, as against the State of Maryland, entitled to the Potomac River to the north bank thereof; her title runs only to high-water mark on the West Virginia shore."
>
> "When a river is the boundary between two nations or States, if the original property is in neither and there be no convention respecting it, each holds to the middle of the stream. But when, as in this case, one State (Virginia) is the original proprietor and grants the territory on one side only, the newly

erected State extends to the river only, and the low-water mark is its boundary."

SAML M. WOLFE,
Attorney-General for the State of South Carolina;
ALVA M. LUMPKIN,
Acting Assistant Attorney-General,
Attorneys for the State of South Carolina, Defendant.

(5184)